

Bob Beaumier comments on ESSHB 1634.

RECOMMENDATION: I recommend the Pipeline Safety Committee OPPOSE this bill for reasons explained. Basically, it needs more work. Beside drafting problems, I am concerned about the effect of the bill to shift costs and risks of pipeline safety towards government. The realities are that 1) government has no money and 2) a trend in case law to open new areas of liability for governmental entities which should be evaluated here. If our help is desired, the committee chair could appoint a few folks from this PSC to work with the affected stakeholders and come up with a better bill. I am glad to participate in any capacity.

PRELIMINARY DISCUSSION: We are a pipeline safety committee for the State of Washington so our basic approach should be to promote and support pipeline safety. ESSHB 1634 shows some thinking about this issue, but it needs more work. On a threshold level, it is not clear how the proposals will actually increase pipeline safety without greater explanation from the pipeline industry operational folks. I am not interested at least initially in hearing from lobbyists about this issue. They are paid advocates. We need operational/field people from the industry and people from the WUTC. If we are to adopt the program recommendations in the bill, a cost-benefit and liability analysis is also needed: Who benefits from the program and how? Who will pay the costs? Will the program shift liability risks and if so, how?*

My background is legal analysis, so that is my focus here. Legal analysis has 2 parts 1) read the language and try to understand it and 2) evaluate how it fits into the larger picture. I am not going to be able to do this in the few days I have had to look at the bill, but here are my preliminary comments. I used to work for local government, but I don't anymore, so I am not interested in "winning" any arguments with anyone. I can just offer the benefit of any knowledge I have and it will need to be judged on that basis.

SECTION 1: amends the purpose clause of RCW 19.122.010. That section is part of chapter 19.122 RCW which is our state underground utility law (one call etc.). That law was originally enacted in 1984 and has been amended several times, although not this section.

The new language states as a purpose

► **1.1** to protect the public health and safety

COMMENT: This is already in the existing law, so it is just placed in first position as the principal purpose. I think the existing law is better, as almost every law passed has a generic purpose of protecting the public

health and safety. I understand this change might have been made because of my own comments (before I left my former employment and became of member of the PSC). But while this is an improvement from the prior draft, it is not an improvement from the original law.

Additionally, this purpose is stated twice in the new law. Don't need to say it twice.

► **1.2** to establish a comprehensive damage prevention program for transfer pipelines, transmission pipelines, and underground facilities...

COMMENT: Does the bill actually do this? [I am not being rhetorical/it is a sincere question]. It is not clear to me how and at whose expense and risk the program will operate, (see discussion on section 5 below).

I note initially that we already have damage prevention programs administered by state and federal regulatory agencies and of course, in the pipeline industry itself. Is the aim of the bill to supplant these? I presume not. But the purpose language says that the new program is "comprehensive" which suggests it is going to be the comprehensive new pipeline safety program. If it isn't, it shouldn't say it is.

► **1.3** The bill identifies 3 areas of focus, transfer pipelines, transmission pipelines, and underground facilities. Presumably underground facilities include distribution pipelines, but why not list them if we want a comprehensive program? Should they be lumped with water, sewer, power and cable as "underground facilities"? I raise the question because our committee is not so concerned with all other underground facilities but gas and liquid petro products.

I understand that the digging for all underground installations creates a possible pipeline safety risk, but I still struggle as to why gas distribution needs to be rolled into the same blanket as all other undergrounds and transfer and transmission are separated out. If we are going to have a comprehensive program for gas and petro pipelines, let the bill be for those kinds of lines. There may be reasons for this design, but at this point, I cannot say what they are absent a better explanation.

The remainder of section 1 just brings back in existing language in the current law, except as an editorial comment, the language "protect and repair damage" on page 1, line 18 could be better phrased.

► **1.4 New case:** A new case just now came out this past week in published form, *Robb v Seattle*. It greatly expands the liability reach of people to sue a local government for affirmative actions. A new pipeline safety program creating affirmative duties to act for local government (and state government) should be reviewed with this case in mind.

Normally for regulatory programs, a government can invoke the public duty doctrine shield which basically says that when a government acts *to govern* it can't be sued except in certain limited circumstances. Contrast this with a government worker driving a car in a negligent manner and hurting someone—there, a government is fully subject to suit just like a private party because simply driving a car is something government workers do just like private workers—not an act of governing. But regulatory programs are acts of governing. Private businesses do not run regulatory programs for the general public benefit

In *Robb* however, the court recognized a legal duty [the foundation for tort liability] on the part of the City of Seattle to protect an injured person from third party actions (*Robb* involved criminal actions of a deranged youth, but the application to pipeline damage by third parties seems less of a hurdle than the *Robb* facts]. As *Robb* is now the law, I think if any change is needed to purpose section (Section 1 of the bill), new language should say:

It is not an intent of this chapter to create or expand governmental liability for operating regulatory programs or taking any actions relating to enforcement of this chapter, and the public duty doctrine shall apply to all such regulatory program operations.

SECTION 2: amends the definitional section, RCW 19.122.020. This section has been amended twice since enactment in 1984, in 2000 and 2007.

► **2.1** The first amendment is the definition of “excavation” in subsection (4). Some of the changes seemed to organize the language for a clearer read, but I would have to defer comment absent a bit further explanation.

► **2.2** The next changes are in removing “operator” from subsection (15). This appears to be combined with adding new definitions of “end user”, “equipment operator” and “facility operator”.

I don't quite understand why “facility operator” (FO) is distinguished from “pipeline company” (PC). A normal person would tend to associate these two terms as meaning the same thing and it appears FOs may be included in the PC definition. But in general, laws should make intuitive sense to a lay reader. Breaking out a new FO definition does not appear to serve this propose. I see in that the PC definition does not include distribution companies, so one reason for a separate FO definition might

be to include distribution companies within the FO definition but still keep them out of the PC definition.

I understand that this new bill did not originate this problem as we see in RCW 19.122.030, which deals with notice to all “owners of underground facilities” and RCW 19.122.033, which was added in 2000, and deals with “pipeline companies”. But the new bill does not well come to grips with a problem it admittedly inherited. See further comments on “facility operator” definition.

On the separate definition for equipment operator (EO), since the PC/FO hires the EO, they are really all the same I feel for our needs, whether the EO is an employee or independent contractor. See further comments below on EC definition.

► **2.3** I am not too excited about defining “facility operator” in terms of someone having a “legal right” to place underground facilities in the public right of way or utilities easement. The fact is, this is not always very clear. You cannot order a title report on the public right of way land generally speaking. So does one have to go to court to figure out what this means? People put things in the right of way without authorization. Franchises expire. It is not clear why people who’s “legal right” may be shaky in a given set of facts might end up exempted from certain obligations. I would need to check this further however to be sure.

► **2.4** “end user” is defined as any utility customer, followed by additional inclusive language.

Why all the extra gingerbread? “End user” is only used in “service lateral” and “sewer lateral”. So we don’t need a whole new definition of “end user” for the whole chapter. Just say “retail utility customer” in “service lateral” and “sewer lateral”.

► **2.5** “equipment operator”. Like “end user”, this definition only pops up in a few places (sections 14 and 15). We don’t need to garble up our definitions section with a separate new definition for the entire chapter. What I have done to deal with this item is just add it in the immediate section where the term is being used, say right in section 14. “For purposes of this section and section 15, “equipment operator” means— etc.” Leave it out of the main definitions section. See also comments below on excavator.

► **2.6** “service lateral”, “sewer lateral” definitions. These are examples of how things can get cobbled up. A “sewer” is already an underground facility, but has its separate definition. A “service lateral” includes a water system. Why would it not? Why call out water but not gas

distribution? In municipal sewer and water utility work with which I am familiar, we did not describe things relating to property vs right of way lines based on customers but based on *property owners*. Customers and tenants come and go.

My initial reaction is that responsibility for a service lateral should be governed by the rules applicable to a given utility. The issue behind all this, I take it, is the age old question of where does or should the PC/FO responsibility end and the property owner (PO) burdens start? Again, I feel, at least absent more information, that this issue should be resolved between the utility and the properties being served.

ESSHB 1634's struggle with this issue is seen in (28) "sewer lateral" which defines that term as a separate term from "service lateral" (27). "Sewer lateral" is defined as a "facility operator's end user service line..." [*This is confusing. Why not just say "service line"?*] "...that transports wastewater from one or more building units or commercial facilities on the end user's property line..." [*what about sewage lagoons or other onsite wastewater collection units that connect to a utility line in the street? Why restrict to building units or commercial facilities? Why do the facilities have to be located "on" the property line, as the language states?*]

► **2.7** Presumably "service lateral" and "sewer lateral" are mutually exclusive terms, but that is not clear. The short of it is that this needs cleaning up. And again, I am uncomfortable that a "comprehensive damage prevention" for transfer and transmission pipelines—at least the kind our committee is interested in—is yoked to things like sewer lines. We are not talking about nearly the same hazard from a broken sewer later as a high pressure gas transmission line or a petro liquid pipeline.

► **2.8** Another problematic definition is "sewer system owner or operator" in (29). Which is it? There is also the provision here that sewer systems are considered to be the end user's property line for locating purposes only. Is there a different rule for gas distribution or water systems? This is not a good example of how a comprehensive bill should be drafted.

(28) uses the term "facility operator sewer system". Is the term "facility operator" here the same as "sewer system owner or operator"? Not clear.

Moving down the bill, we see at p. 9, section 4 (4), ll. 9-11 that the obligation to mark devolves to the facility operator or sewer system owner or operator. An easier expression would be the owner of the line. Same with section 4 (5). "Good faith compliance" is a complete defense in section 4 (5). Is that a subjective standard? If it is, it will be very hard to enforce as everyone will assert "I tried as hard as I could". This is a

pretty generous defense if it will excuse even negligence. Should someone who is negligent be immune from suit just by showing they acted in good faith? A lot of negligent people would be off the hook in that case. The 2 standards are not equivalent.

Along the lines of above comments, the separate use of sewer system owner/operator only shows up in Section 4 (4) and (5). It is very confusing to break out sewer lines from water and gas distribution and the language should not become law of the State of Washington in current draft form.

SECTION 3. Skip.

SECTION 4. This amends RCW 19.122.030, one of the main one-call statutory provisions.

► **4.1** I see we still have the “unless otherwise agreed to” language in there. This is in existing law, but I never liked it particularly. How do we get around a “he said-she said” problem if there is an accident? How can people agree to waive obligations of law? As a practical matter however, it may make sense operationally, so I would be inclined to defer to our operations folks, but still like a little more discussion about how it has worked; is the WUTC happy with this? Could this be parlayed into a “good faith” defense—eg. “I thought we had agreed etc”—to a violation? Also, not sure who “the parties” are that must all agree. Needs at least a little further discussion before I would recommend support.

► **4.2** Section 4 (1) does not change the current law, but defines obligations in terms of an “excavator” being obligated to notify “all owners of underground facilities”. We have an existing definition of “excavator” in RCW 19.122.020 (6) as any person engaging directly in excavation. It is not clear if this means equipment operator also and again, why have 2 similar terms crashing into each other. This is basically also what is happening with “pipeline company” and “facility operator” on a different level and other terms involving sewer and water as discussed above. The thought process in the draft bill is incomplete.

► **4.3** Section 4 (1)(c) says that for multiple sites an “excavator” must take “reasonable steps” to “work with” facility operators. I would suggest this language is so vague that no court would enforce it. What is “reasonable”? What does it mean to “work with” someone? Most courts confronted with this kind of language would a) declare it void for vagueness (most likely result) or b) send the issue to a jury. Laws should try to clarify and resolve issues, not create them.

Somewhat the same problem with section 4 (7) use of the term “reasonably accurate information”, although I recognize this is already in our existing law. There is in fact quite a bit of the use of the term “reasonable” in the existing law. I am not sure if this means no one knew what to do about the issue, but what it means in reality is that the question will generally be decided by a jury. (“Reasonable care” is usually a jury fact issue.) My question would be whether this is how we want to solve pipeline safety issues? By jury trials? Are there easier, less expensive, and more predictable ways?

► **4.4** I did not have a chance to check all the language removed on pp. 7 and 8 from current RCW 19.122.030 (2)-(7).

► **4.5** Along the lines of comment 4.2 and definitions scraping against each other, compare also section 4 (3)—a facility operator may claim compensation for responding to notices less than 2 days in advance. But not a sewer system operator? We distinguish the two terms in section 4 (4) right after 4 (3). A basic rule of statutory construction is that if a statute uses terms in one place but not another, the court will assume the omission was intentional. This will be especially true here where we list out “sewer system owner or operator” separately in 4 (4) but not in its neighbor 4 (3).

► **4.6** The drafters say service or sewer laterals existing on private property are the “responsibility of the property owner” [p. 9, l. 23]. I think most people would be surprised to learn that it is their responsibility to know where there gas distribution or underground telephone or cable line is located on their property. Maybe large commercial properties know and plan this information, but not your average homeowner. Why the free pass for the utility company that has always handled this? It is one thing for a utility company to say to its customers: you must *pay* for this part of an installation because it is on your property, but a hugely different proposal to say a private owner is legally “responsible” for something they know nothing (most likely) about.

The section goes on to say that a property owner doesn’t have to subscribe to one-call or locate the line. If that be true, why does the law say they are still “responsible”? Again, I understand that the service lateral issue might be good to examine, but this bill does not address it well and needs work in that area.

SECTION 5. This section amends and greatly expands RCW 19.122.033

► **5.1** First, the existing law only deals with excavator notification so if we are going to adopt a totally new program for state and local notification, at least it should go in a new section of its own.

► **5.2** Section 5 (3)—sets up new notification requirements on state or local governments to notify a transmission pipeline company whenever there is construction activity within 100 feet or greater distance as defined by local ordinance. An initial question to me is whether this is a good idea from the perspective of the questions raised in the Preliminary Discussion section ** above. Will this idea truly increase pipeline safety? Has a cost-benefit and liability analysis been done? In other words, who benefits from the program and how? Who will pay the costs? Will the program shift liability risks and if so, how?

I do not suggest there will be no public benefit from the idea. I just believe the issues need more examination. At least on first blush, if the idea has merit, I feel the burden or major part of the burden of paying for a new notification program should be on the shoulders of the pipeline companies and people who want to dig next to the company's installations, not local government. Pipeline transmission companies for example serve a very important purpose, but they are profit making businesses. They basically pay nothing to local governments for burdens their facilities create as it is, let alone a new program.

► **5.3** Additional language: If there is a good showing that the proposals in 5 (3) should be adopted, I would ask for some additional items:

► **5.3.1** language that all program development, maintenance and operation costs, including costs of the notification under this section may be recovered by a governmental entity from the pipeline company and/or parties requesting a permit or undertaking construction, as determined by the permitting governmental entity;

► **5.3.2** a provision that the pipeline company may not impose any special costs or requirements on development activities occurring outside the pipeline easement corridor, and must reimburse any reasonable developer expenses; and

► **5.3.3** a provision that within the pipeline easement corridor, the pipeline company may impose reasonable requirements and cost recovery, subject to review and approval by the WUTC and any permitting governmental entity

REMAINDER OF BILL: I did not have time to make any careful review of the rest of the bill. I appreciated section 16 and hope it would be very productive. Also thought sections 18—20 might be of value, but would defer to WUTC.